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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1596

ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, *et al.*,

Petitioners,

—v.—

MOW SUN WONG, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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The American Civil Liberties Union files this brief pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Both parties have consented to the filing of this brief. Copies of the consents have been filed with the Clerk of this Court.

INTEREST OF AMICUS

The American Civil Liberties Union is a nationwide non-partisan organization of over 250,000 members devoted solely to the protection of the liberties safeguarded by the Bill of Rights. In its fifty-four year existence the ACLU has been particularly concerned with the right of aliens to enjoy the full protection of our Constitution. The ACLU has participated in numerous cases in this and other courts to challenge deprivations imposed upon non-citizens. The Union is also deeply concerned with laws that impose invidious discriminations upon distinct classes in our society, and believes that such invidious discriminations are no less violative of the Constitution when imposed by the United States than when imposed by the individual states. For these reasons we file this brief to urge affirmance of the judgment of the Court of Appeals.

ARGUMENT

I.

The Total Exclusion of Resident Aliens from All Employment in the Federal Civil Service Cannot Be Sustained on the Ground That Employment in the Federal Civil Service Is a "Privilege of National Citizenship" or That the Exclusion of Aliens from Such Employment Is Within the "Plenary Power" of the Federal Government.

In Sugarman v. Dougall, 413 U.S. 634 (1973), this Court held that the total exclusion of resident aliens from all public employment by the states was violative of the Fourteenth Amendment's guarantee of equal protection of the laws. Likewise, in In re Griffiths, 413 U.S. 717 (1973), it held that the states could not constitutionally deny resident aliens admission to the bar solely because of their status of alienage. As in Bolling v. Sharpe, 347 U.S. 497, 500 (1953), "[i]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." If a classification is invalid under the equal protection

clause of the Fourteenth Amendment, it is also inconsistent with the due process requirements of the Fifth Amendment. Johnson v. Robison, __ U.S. __, 94 S.Ct. 1160, 1164 n. 4 (1974). If the states cannot constitutionally discriminate against aliens with respect to eligibility for public employment on the ground that such employment is a "privilege of citizenship," it is difficult to see how the federal government can invoke the long-discredited "privilege-right" dichotomy to effect the same kind of discrimination.

But this is precisely what the government is arguing in seeking to overturn the judgment of the Court of Appeals in the case at bar. Heedless of this Court's clear pronouncement that is has "now rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege,'" Graham v. Richardson, 403 U.S. 365, 374 (1971), the government nonetheless argues that employment in the federal civil service is a "privilege of national citizenship," so that the total exclusion of resident aliens from federal employment is constitutional, although the identical

exclusion when practiced by the states is unconstitutional.

In support of this argument it sets forth a very sophisticated - or, as we would submit, sophistic - line of reasoning, beginning with the "unique legal status" of aliens, going through the provisions of the Constitution limiting the right to vote and to hold office to citizens, and the practice of other nations in excluding aliens from governmental employment, and ending up with the conclusion that the Privileges and Immunities clause of the Fourteenth Amendment (which by its terms limits action by the states) somehow establishes employment by the federal government as a "privilege of national citizenship," so as to render constitutional under the Fifth Amendment discrimination practiced against aliens by the federal government that would be unconstitutional under the Fourteenth Amendment if practiced by the states. In the final analysis, however, this reasoning is nothing more than "old wine in new bottles," and is simply the invocation of the discredited "right-privilege" dichotomy to sustain the discrimination against aliens in federal employment.

It is clear that for constitutional purposes employment by the federal government can in no way be viewed as a "privilege," subject to any conditions the federal government wishes to impose and insulated from judicial review. United Public Workers v. Mitchell, 330 U.S. 75 (1974); Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973). But what the government is arguing here is that such employment is indeed to be treated as a "privilege" when it is denied to resident aliens because (1) aliens have a "unique legal status" and (2) such employment is a "privilege of national citizenship" established by the Fourteenth Amendment. The fact that aliens occupy a "unique legal status," however, has nothing to do with the invocation of the "privilege-right" dichotomy, since, as the government admits, aliens are "persons" within the meaning of the Fifth and Fourteenth Amendments." Brief for Petitioner, p. 27. While it may be true that all legal distinctions between citizens and aliens are not blurred, as the government contends, those distinctions must be supported by something other than the notion that citizens have the "privilege" of government employment while aliens do not. The discrimination effected

against aliens must be supported, as this Court has made abundantly clear, by the showing of a compelling governmental interest, Graham v. Richardson, supra, and the "unique legal status" of aliens as such cannot justify discrimination against them by the federal government once they have been admitted for permanent residence into this country and have not been deported.

The contention that the Privileges and Immunities clause of the Fourteenth Amendment justifies the denial of federal employment to aliens because such employment is somehow a "privilege of national citizenship" is utterly fallacious, and is nothing more than circular reasoning which assumes the very point in issue. The government argues that (1) aliens can be excluded from federal employment because such employment is a "privilege of national citizenship," and that (2) such employment is a "privilege of national citizenship" because it is employment with the federal government. What is totally missing from this analysis is an explanation of the reasons why employment with the federal government is a "privilege of national citizenship." According to the government, the test for determining what is

such a "privilege" is whether the "privilege" reasonably can be said to "inhere in that special relationship with the national government which is traditionally characteristic of citizenship." Brief for Petitioner, p. 36.[1] In other words, federal employment can be limited only to citizens, because it is a "privilege of national citizenship," and it is a "privilege of

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[1]The government, in formulating the supposed test of a "privilege of national citizenship," says that it must be determined whether the "right" is one of those that "owe their existence to the Federal government, its National character, its Constitution, or its laws." Brief for Petitioner, p. 36. This test would necessarily mean that federal employment is a "privilege of national citizenship," since such employment owes its existence to the "Federal government, its National character, its Constitution, or its laws." The same rationale would mean that admission to practice before the federal courts is a "privilege of national citizenship." It might, therefore, be appropriate for the government to advise this Court whether its position is that an alien, who is entitled to practice before the state courts, In re Griffiths, supra, can constitutionally be denied admittance to practice before the federal courts.

national citizenship" because it involves a special relationship with the national government which is traditionally characteristic of citizenship. But there is no explanation whatsoever as to why employment with the federal government involves a special relationship which only a citizen can have, and such an argument merely assumes, ipse dixit, the point in issue.

In no way can the total exclusion of resident aliens from all federal employment be sustained on the ground that federal employment is a "privilege of national citizenship." Since aliens, no less than citizens, are "persons" within the meaning of the Fifth Amendment's due process clause, Galvan v. Press, 347 U.S. 522 (1954), they, like citizens, have a right to be employed by the federal government unless the government can advance constitutionally sufficient reasons to justify their exclusion. The day of the "right-privilege" dichotomy as applied to governmental employment is long since past, and the attempt of the government to revive that dichotomy in order to justify the discrimination against aliens in federal employment should be thoroughly rejected.

Continuing in this vein, however, the government adds a variation on the theme, namely that the total exclusion of resident aliens from federal employment is somehow related to Congress's power "to fix the conditions under which aliens are to be permitted to enter and remain in this country," and to the President's power over foreign relations, so that the exclusion is constitutionally valid "without regard to its rationality or the substantiality of its underlying reasons." Brief for Petitioner, p. 50. What the government appears to be arguing here is that the "plenary power" of Congress over immigration and naturalization entitles it to impose discriminations against aliens lawfully admitted for permanent residence that would be unconstitutional if imposed by the states and that the discrimination in question involves the exercise of the President's foreign affairs powers, so as to give rise to a "political question" effectively insulated from judicial review. Judicial review of the constitutionality of the federal government's actions in dealing with aliens, it says, is limited to determining whether such action contravenes an explicit provision of the Constitution or

otherwise clashes with those individual liberties protected by the Bill of Rights. Brief for Petitioner, p. 49. In short, the government argues that the "general principles of due process" contained in the Fifth Amendment do not apply to the federal government's actions in dealing with resident aliens.

Such an argument has consistently been rejected by this Court. See e.g., Wong Wing v. United States, 163 U.S. 228 (1896). In Galvan v. Press, 347 U.S. 522 (1954), for example, which the government cites for the proposition that "policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government," the Court said in the very next sentence that, "In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process." 347 U.S. at 531. The Court also noted in that case, as the government admits, that "[s]ince he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process clause as is afforded to a citizen." 347

U.S. at 530. That case, as did the others cited by the government, involved the applicability of due process to deportation proceedings, and admittedly this Court has been reluctant to impose limitations on the substantive grounds for which an alien can be deported. But once an alien has been admitted to this country for permanent residence, and so long as he has not been deported, he is entitled to the same protections of the Constitution as are afforded to citizens. Just as, "[t]he phrase 'war power,' cannot be involved as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit," United States v. Robel, 389 U.S. 258, 263 (1967), the phrase "plenary control over immigration and naturalization" cannot render constitutional discrimination practiced by the federal government against resident aliens. As the Court of Appeals observed in the case at bar:

> "With its plenary power, Congress can prevent or limit the number of aliens entering the country, and thus, can decrease or eliminate the problem raised in this case. But

> once legally within our country's borders, there are constitutional limitations as to how aliens can be treated by the government vis-a-vis citizens of this country." (Pet.App.A 13a, n. 11).

The argument that the "general principles of due process" contained in the Fifth Amendment do not apply to the federal government's actions in dealing with aliens is totally unfounded and has been consistently rejected by this Court. It would be unthinkable for this Court to sustain governmental action discriminating against resident aliens "without consideration of the rationality or the substantiality of the reasons that might underly it." Since aliens are "persons" within the meaning of the Due Process clause, the "general principles of due process" protect them from unconstitutional action on the part of the federal government in the same manner as the "general principles" of due process and equal protection contained in the Fourteenth Amendment protect them

from unconstitutional action on the part of the states.[2]

Neither the notion of federal employment as a "privilege of national citizenship" nor the notion of "plenary power over aliens" can sustain an otherwise unconstitutional discrimination under the Fifth Amendment's due process clause. The total exclusion of resident aliens from all federal employment is unconstitutional in the same manner as such exclusion when practiced by the states, unless the government can advance a justification for this exclusion which will withstand constitutional scrutiny. This, it is submitted, it cannot do.

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[2]Even if the question of excluding resident aliens from government employment is somehow considered "political," the "talismanic incantation" of "political" likewise no longer operates to preclude judicial protection of constitutional rights. Powell v. McCormack, 395 U.S. 486 (1969).

II.

The Total Exclusion of Resident Aliens from All Employment in the Federal Civil Service Is Patently Arbitrary and Unreasonable, and Serves No Legitimate, Let Alone Compelling Governmental Interest.

The government argues that the total exclusion of resident aliens from all federal employment can be sustained as constitutional under either the "rational basis" test or the "compelling interest" test, and does not explicitly argue here, as it did in Weinberger v. Diaz, No. 73-1046, this Term, that classifications based on alienage when made by the federal government, as opposed to when they are made by the states, are not subject to the strict scrutiny of the compelling governmental interest standard. For the reasons advanced in its brief in Weinberger, the amicus would respectfully ask that this Court make it clear that classifications on the basis of alienage are no less inherently suspect when made by the federal government than when made by the states, and that such classifications

are in all circumstances to be subject to the strict scrutiny of the compelling governmental interest standard. But the amicus would also submit that, irrespective of the standard by which it is tested, the total exclusion of resident aliens from all federal employment is patently unconstitutional.

As the government appears to recognize, it has a heavy burden of persuading this Court that the discrimination with respect to total exclusion from public employment which this Court found unconstitutional when practiced by the states in Sugarman v. Dougall, supra, somehow becomes constitutional when practiced by the federal government. After noting that such discrimination is "hoary with age," and that it is practiced by many other nations as well, the government falls back on the supposed "plenary federal power to regulate with respect to aliens," and the "unique responsibilities" of federal employment to which it says that citizenship bears a "special relationship." All of these justifications were found wanting by the Court of Appeals, and they are clearly

insufficient to justify the total exclusion of resident aliens from all federal employment.

The "plenary power" argument involves the same circular reasoning as that advanced earlier by the government. The fact that the federal government has "plenary power" over immigration and naturalization cannot as such make constitutional what would otherwise be a violation of due process of law. As has been observed, "The federal government has interests different from those applicable to the states, but nonetheless, it must demonstrate that its interests justify the discrimination against aliens." Jalil v. Hampton, 460 F.2d 923, 929 (D.C. Cir.), cert. denied, 409 U.S. 887 (1972). In other words, a classification based on alienage by the federal government is tested by whether it advances a compelling federal interest while such a classification by the states is tested by whether it advances a compelling state interest. Moreover, state regulation of aliens may be invalidated on pre-emption grounds, as in Hines v. Davidowitz, 312 U.S. 52 (1941). The point is that while, as the government argues, "a federal law or regulation concerning aliens may well be constitutional

even though an identical state statute would be valid," Brief for Petitioner, p. 62, this would only be because either (1) the state statute was invalidated on pre-emption grounds or (2) the federal statute was shown to advance a compelling federal interest while the state statute was not shown to advance a compelling state interest. The so-called "plenary power" over aliens that belongs to the federal government does not make constitutional discrimination against aliens by the federal government that cannot be shown to advance a compelling federal interest.[3] In Sugarman v. Dougall, supra, and In re Griffiths, supra, the total exclusion of resident aliens from public

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[3]The government suggests that if it were constitutionally required to open federal employment to resident aliens, it would be inhibited from negotiating the reciprocal termination of comparable discrimination against the employment of American citizens in the civil services of other countries. Brief for petitioner, p. 61. The notion that resident aliens may be used as "bargaining chips" to obtain benefits for American citizens residing abroad truly "shocks the conscience" and violates the first principles of due process of law.

employment and from admission to the bar were struck down as unconstitutional, since no compelling state interest for such exclusion could be shown. In the case at bar the total exclusion of resident aliens from federal employment must likewise be invalidated unless a compelling federal interest justifying such exclusion can be shown.

In trying to distinguish employment by the federal government from employment by the states, the government does no more than indulge in generalities about "nationhood," "sovereignty," "undivided allegiance" and the like. It says that citizens will be more "loyal" to the federal government than aliens and that they are more likely to have a knowledge and understanding of American history and of the principles and forms of the government. But it never explains why these considerations justify the total exclusion of resident aliens from some three million positions in the federal civil service. The closest it comes to trying to do this is when it says that it would be "administratively inconvenient" to classify the positions for which citizenship could

constitute a bona fide occupational requirement. Apart from the fact that "administrative convenience" is "insufficient to make valid what otherwise is a violation of due process of law," Cleveland Board of Education v. LaFleur, 414 U.S. 632, 647 (1974), the implication here is that most of these three million jobs could, for security or other reasons, properly be reserved to citizens. This is clearly absurd. The overwhelming majority of positions in the federal civil service do not involve policy-making and are in no way connected with national security. Most employees of the federal government, like most of the employees of state governments and like most persons employed by private industry, are engaged in the "common occupations of the country," and there is no reasonable relationship between citizenship and the ability to perform most of the positions in the federal civil service.

The vice of the exclusion contained in the challenged regulations, as in Sugarman v. Dougall, supra, is, of course, its overbreadth. There has been no effort on the part of the government to bar "some or all aliens from closely defined and limited

classes of public employment on a uniform and consistent basis." 413 U.S. at 639. And likewise, there has been no showing of a compelling, or even a legitimate governmental interest, that is served by barring all resident aliens from all positions in the federal civil service.[4] Even under the

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[4]The government makes much of the fact that Congress has long imposed statutory limitations on the employment of aliens in the continental United States. While this is indeed true and supports the government's contention that the regulations in question are in accord with Congressional authorization, the nature of the limitations totally undercuts the argument that there is any rational connection between citizenship and suitability for all federal employment. This is because the limitations do not extend to all resident aliens, but exclude nationals of specified countries. The current limitation, which is contained in the Treasury, Postal Service and General Government Appropriations Act of 1973, 86 Stat. 487, excludes aliens from Poland and the Baltic states, as well as those coming from countries "allied with the United States in its current defense effort." No rational reason can be suggested why aliens from these countries would be more suitable for federal employment than aliens from other countries. Moreover, as the government points out, there are a number of statutory exceptions to the ban on civil service employment of aliens. Brief for Petitioner, p. 84, n. 72. It is interesting to note, that all employment in the Department (con't.)

"rational basis" test the exclusion of all resident aliens from all federal employment is so irrational and arbitrary as to be violative of due process of law, because it creates a conclusive presumption that all aliens, by virtue of that status alone, are unqualified for all federal employment. C f. Cleveland Board of Education v. LaFleur, supra. A regulation that excludes persons from three million positions in the federal civil service solely because of their status as aliens can in no way be shown to be related to the accomplishment of any legitimate, let alone compelling, governmental interest.

When all is said and done, the government has done nothing more than argue that it is entitled to exclude resident aliens from all federal employment solely because they are

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(Footnote 4 con't.)
of Defense, The Atomic Energy Commission, and the National Aeronautics and Space Administration, for example, which would seem to involve the most sensitive positions requiring the highest degree of loyalty, are fully open to aliens. Surely, in view of the Congressional determination in this regard, it is utterly irrational to argue that there is any correlation whatsoever between the status of alienage and suitability for federal employment.

aliens. Whether it invokes the notion that federal employment is a "privilege of national citizenship" or that the federal government has "plenary power" over aliens, or that federal employment involves "unique responsibilities and relationships," it is simply arguing that aliens because of their status should not have the "benefit" of federal employment. This nation, however, has not readily countenanced discrimination against "discrete and insular minorities," and regardless of what may be the practice of other nations, this nation has treated resident aliens as "persons" entitled to the protection of its Constitution. The Fifth Amendment's guarantee of due process of law invalidates the total exclusion of resident aliens from all federal employment in the same manner as the Fourteenth Amendment's guarantee of equal protection invalidates the total exclusion of resident aliens from all public employment by state governments. As one Court has observed:

> "We conclude that Congress itself, when legislating generally on matters not related to the furtherance of its naturalization responsibilities, may not single out aliens for discriminatory treatment for-

bidden to the states. Any other result would lead to a peculiar hierarchy of rules, in which the federal government would enjoy a license to engage in practices condemned by the courts as unfair and discriminatory when done by the states." Ramos v. United States Civil Service Commission, 376 F. Supp. 361 (D.P.R. 1974), appeal docketed, No. 74-216, this Term.

The discrimination effected by the total exclusion of resident aliens from all federal employment is clearly unconstitutional, and this Court should now so hold.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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